Supreme Court, U.S.
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No. 89-659

In The

Supreme Court of the United States

October Term, 1989

ELECTRO-TECH, INC.,
a Michigan Corporation,
Petitioner,

v.

H. F. CAMPBELL CO.,
a Michigan Corporation,
and
CITY OF WESTLAND,
Respondents.

PETITIONER'S REPLY BRIEF
IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDICES –

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Respondents' Brief presents a number of misstatements, misrepresentations, inaccuracies, and statements of fact that are not part of the record.

ARGUMENT

The first and most obvious inaccuracy in Respondents' Brief relates to the Consent Judgment in Wayne County Circuit Court, Detroit, Michigan, dated November 18, 1983, which dealt with the condemnation proceedings between the parties hereto. Respondents' Brief indicates that the Consent Judgment referred to above is included in its Brief. Yet a review of Respond-

ents' Brief indicates that there is no copy of the Consent Judgment attached; therefore, Petitioner is including a copy of said Judgment as Appendix J herein. In addition to not including a copy of the Consent Judgment, Respondents have made a number of errors when referring to the terms of the Judgment. At page 1 and at page 5 of Respondents' Brief, Respondents state that the award included interest through October 13, 1979. Contrary to Respondents' statements, paragraph 1(d) of the Judgment states that the Judgment includes interest through October 13, 1983. At page 25 of Respondents' Brief, Respondents make an even more glaring error and misstatement wherein it is stated, ". . . with the Petitioner ultimately receiving over $600,000.00 'in just compensation'." A review of the Judgment clearly shows the amount Petitioner was entitled to totalled $64,134.88.

Finally, with reference to this Consent Judgment, Respondents a number of times argue that Petitioner received "just compensation" for the property taken, thus inferring and in fact stating that the condemnation case fairly compensated Petitioner for the damages which he is seeking in the present case. This again is contrary to the terms of the Consent Judgment, wherein at paragraph 4 it is expressly stated that, "This Judgment is limited to the damages and just compensation arising out of this condemnation case." Thus, very clearly Petitioner is not precluded from obtaining damages from the loss of use of its property. By their inaccuracies, errors, and misstatements, Respondents clearly misrepresent to this Court matters that are clearly and irrefutably part of the court record.

Respondents' inaccuracies and misstatements continue throughout the Brief. At page 3, Respondents state that, "Campbell did not submit site plans to

Electro-Tech, Inc. until March 1979". First of all, Campbell never submitted site plans to Electro-Tech, Inc., but the site plans were submitted to the City of Westland's Building Department. Secondly, the site plans were submitted substantially prior to March of 1979. Respondents' own statement continuing at page 3 states: "On February 21, 1979, Campbell was already receiving notification relative to requirements on the site plan presented."

At page 4, Respondents state that the site plan was scheduled for review before the City Council several times but was postponed to permit the Petitioner's President, Mr. Jack Beauchamp, to attend. Respondents continue at page 4, stating that "After several other adjournments to permit the Petitioner to attend, the Petitioner's site plan was scheduled for review on June 11, 1979. At page 5 Respondents state: "At the June 11, 1979 hearing, Mr. Jack Beauchamp told the City Council he would not dedicate the property as requested."

Respondents would have this Honorable Court believe that the chain of events leading up to this litigation was that sometime in March 1979 a site plan was submitted by Petitioner, scheduled for review before the City Council, postponed several times because of Beauchamp's failure to appear until June 11, 1979 when Beauchamp told the City Council he would not dedicate the property as "requested". This was put to Petitioner as a DEMAND, never a "Request". Further, that the City Council never rejected Petitioner's site plans, thus inferring that a final decision had not been made, but by October 15, 1979 indicated to Petitioner that it wanted to purchase the "requested" property.

Not only is this scenario not supported by the trial record, but it is totally inaccurate. Contrary to Respondents' scenario, the site plan was presented to the Plan-

ning Commission prior to February 21, 1979, since the Planning Commission already met on February 21, 1979, approved the site plan with the five (5) contingencies and sent its recommendation for *final approval* to the City Council. The matter was before the City Council not for review, but for final approval. By formal resolution, the City Council adopted the Planning Commission's recommendation.

There is no evidence in the trial record to support Respondents' representation or inference that the matter was postponed until June 11, 1979, due to Jack Beauchamp, and that only because Jack Beauchamp would not dedicate the property as "requested" on June 11, 1979, that the city undertook the condemnation action.

The UNCONTROVERTED testimony at trial was that there were half a dozen different council meetings beginning some time in February, that Mr. Beauchamp attended some and Mr. Wagner (the representative from H. F. Campbell Company) attended some (see Appendix at H-3 of Petitioner's original Brief) and that on at least 4 to 5 occasions Mr. Beauchamp attended council meetings and "vehemently objected" to the city's demand. The dedication requirement, however, was never removed by the city council even after the condemnation proceedings were initiated by Respondents' letter of October 15, 1979. The contingency remained unremoved by the city and as presented by Petitioner's evidence at trial by October 1979 it was too late for Petitioner to bid on the government contracts and too late for Petitioner to begin construction of his addition. The damage had been done, Petitioner was not allowed to build on his property because of an arbitrary, capricious and self-admitted "wrongful" act by Respondents.

At page 8 Respondents state that, "Petitioner did not proceed at the trial level nor at the Court of Appeals level on a theory that the Respondent had violated Petitioner's substantive due process rights", but on a theory of "regulatory taking" (page 1) or "denial of procedural due process" (page 2). This is an inaccurate and misleading statement. Petitioner's Complaint in state court, brought under 42 USC 1983, pled violations of Petitioner's rights under both Federal and State Constitutions and deprivation of due process and violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Petitioner concedes that the specific term "Substantive Due Process" was not used in the pleadings; however, Michigan General Court Rules do not require such specificity. Michigan merely requires a pleading which informs the other party of the facts upon which the case is based.

Michigan General Court Rules of 1963, GCR 1963 GENERAL RULES OF PLEADING, states in part:

> 1. Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim or third party claim, shall contain
>
> (1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend; . . .

(See Appendix K for full text.)

Subsequent to the trial court's granting Respondents' Motion for Summary Disposition on Petitioner's state claims, Respondents raised no objections to the matter

proceeding to trial on the violations of Petitioner's constitutional rights under 42 USC 1983.

It was for the first time, in their Motion for Judgment Notwithstanding Verdict, that Respondents claimed that Petitioner failed to plead and prove an action under 42 USC 1983 because state law provided adequate remedies to compensate Petitioner for the alleged taking.

In denying the motion, the trial judge inquired whether the sole basis of Respondents' motion was that Petitioner had a claim under state law, and Respondents answered yes. Consequently, the trial court ruled: "You argued at the trial of this case that there was no state claim. I agreed with it, and you are not in a position now to be heard to come in to say, yes, he did have a state remedy. And if there is nothing more than that, I don't need to hear anymore."

The facts presented through the uncontroverted testimony and evidence at trial clearly established a violation of Petitioner's substantive due process rights. It is for this reason that Respondents' reliance on *Parratt* v *Taylor*, 451 US 527; 101 S. Ct. 1908; 68 L. Ed.2d 420 (1981) is misplaced and not applicable here, as it was inapplicable in Respondents' Argument at the Michigan Court of Appeals level.

It is an absolute misstatement of fact in Respondents' present Brief at page 8 that Petitioner had not raised the issue of substantive due process at the Michigan Court of Appeals level and again misstates at page 21 that Petitioner for the "first time" on appeal to the Michigan Supreme Court attempted to raise a substantive due process issue. The thrust of Petitioner's Brief and oral argument in the Michigan Court of Appeals was that *Parratt* applied only to procedural due process

claims and not to the present case because this case deals with a violation of substantive due process.

Petitioner relied on and cited *Wilson* v *Beebe*, 743 F.2d 342 (CA 6th, 1984), a case originating in Michigan which held at pages 350-351 that: "Where the tort committed violates a substantive due process right and shocks the conscience of a court, section 1983 liability may also be found in addition to liability for damages to Plaintiff's physical and economic interests."

Petitioner's argument in the Michigan Court of Appeals was replete with case law establishing the fact that calculated, deliberate abuse of government power, such as the facts presented herein, constituted violation of substantive due process. Citing *Davidson* v *Cannon*, 474 US 327; 106 S. Ct. 677; 88 L. Ed.2d 677 (1986); and *Daniels* v *Williams*, 474 US 327; 106 S. Ct. 662; 88 L. Ed.2d 662 (1986), portions of Justice Rehnquist's opinions from these cases were read to the Michigan Court of Appeals panel at the time of oral argument.

On the one hand, Respondents are attempting to convey to this Court that Petitioner had never argued Substantive Due Process prior to the Michigan Supreme Court, which as demonstrated above is untrue, thus inferring that Petitioner should be precluded from relying on the substantive due process argument in this appeal. On the other hand, for the first time before this Honorable Court, Respondents are adopting as their own argument that the decision of the Westland City Council was not final, therefore not ripe for adjudication.

The fact of the matter is that Respondents had never raised the issue of finality or ripeness, and had never objected to this matter proceeding to trial because of lack of finality or ripeness. It was the majority in the 4-to-3 Michigan Supreme Court decision to first address

the issue of finality and ripeness in misapplying the principles of *Williamson* v *Hamilton Bank*, 473 US 172; 105 S. Ct. 3108; 87 L. Ed.2d 126 (1985), to the facts of this case.

Respondents' position has been from the time of filing their Motion for Judgment Notwithstanding Verdict and in the Michigan Court of Appeals, relying on *Parratt*, that because of adequate remedies under state law, Petitioner should be precluded from pursuing a 42 USC 1983 cause of action. Contrary to Respondents' position, the Michigan Supreme Court in its opinion cites *Patsy* v *Florida Board of Regents*, 457 US 496, 550; 102 S. Ct. 2557; 73 L. Ed.2d 172 (1982), where the United States Supreme Court unequivocally stated that exhaustion of state administrative remedies is not a prerequisite to bringing an action under 42 USC 1983. Further, based on *Monroe* v *Pape*, 365 US 167, 183; 81 S. Ct. 473; 5 L. Ed.2d 492 (1961), it is well established that a plaintiff need not exhaust state judicial remedies before proceeding to Federal Court with a section 1983 action. Now that the Respondents are not in a position to argue that Petitioner herein had state remedies available which precluded a section 1983 cause of action, Respondents have adopted what the Michigan Supreme Court states as a finality and ripeness argument.

CONCLUSION

As demonstrated above, Respondents' Brief presents not only errors, inaccuracies, misstatements, and misrepresentations to this Court but additionally presents statements of fact that are not supported by the trial record. Beginning with its inaccuracies and omission regarding the Consent Judgment relative to the condemnation case and continuing through its counter-

statement of the case and argument to this Court, the misstatements and misrepresentations create a scenario either expressly or by inference of a factual situation that is clearly not supported by the trial record. Respondents' Brief is a self-serving, neoteric attempt to tailor facts and arguments to conform with the 4-3 Michigan Supreme Court decision as the Court interpreted *Williamson* and its allied cases. Clearly, the facts on the record cannot now be manipulated to fit into the finality and ripeness argument that was never raised earlier and, therefore, Respondents' Brief and argument should not prevail in the decision reached by this Honorable Court.

The Michigan Supreme Court's application of the *Williamson* case is not applicable to this case and, if applicable at all as stated in Petitioner's original Brief, falls clearly into the futility exceptions to *Williamson*.

Based on all the foregoing, there is no question that the Michigan Supreme Court decision in the instant case is erroneous and should be reversed by this Honorable Court.

Respectfully submitted,

JACKSON & LASKA, P.C.
Attorneys for Petitioner,
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By: /s/ WILSON M. JACKSON
/s/ GEORGE LASKA
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Dated: December 18, 1989

APPENDICES TO PETITIONER'S REPLY BRIEF

(Reprising the pagination from Petitioner's Writ of Certiorari)

APPENDIX J

CONSENT JUDGMENT

(State of Michigan — Circuit Court — County of Wayne)
(Entered November 18, 1983)

(IN THE MATTER OF THE PETITION OF THE CITY OF WESTLAND FOR CONDEMNATION OF PRIVATE PROPERTY FOR THE OPENING, IMPROVEMENT, CONSTRUCTION & DEVELOPMENT OF NEWBURGH ROAD NORTH OF PALMER TO SOUTH OF CHERRY HILL, AND FOR THE CONSTRUCTION OF A BRIDGE OR OVERPASS FOR GRADED SEPARATION OVER AND ABOVE THE CHESAPEAKE AND OHIO RAILROADS – Hon. WILLIAM GIOVAN; Civil Action No. 80-045-107-CC; Parcels 118(I) & 118(II))

At a session of said Court, held in the City-County Building, City of Detroit, County of Wayne, State of Michigan on November 18, 1983.

PRESENT: HON. WILLIAM J. GIOVAN,
CIRCUIT COURT JUDGE.

The City of Westland and Electro Tech, Inc., Respondent to Parcel 118(I) and Parcel 118(II) having consented on the record to entry of judgment herein; and this Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Judgment be and hereby is entered for payment of the following amounts:

a.	Total Award ($50,000.00 less $18,310.00) ----------	$31,690.00
b.	Reimbursement of Costs ----------	1,500.00
c.	Statutory Attorney Fee ----------	100.00
d.	Interest through October 13, 1983 ----	$12,534.88
		$45,824.88

2. This judgment is conditioned on and will not take effect until formally approved by the Westland City Council.

3. This judgment shall bear interest from the date of October 31, 1983, until the date paid.

4. Any claims disposed of herein by this Judgment shall not be disposed of or duplicated in Wayne County Circuit Court No. 80-045107-CC. This Judgment is limited to the damages and just compensation arising out of this condemnation case. This Court shall retain jurisdiction as to any interpretation of the effect of this judgment.

/s/ WILLIAM J. GIOVAN
CIRCUIT COURT JUDGE

Approved as to Form and Substance
and Waived as to Notice of Entry:

JACKSON & LASKA, P.C.
/s/ WILSON M. JACKSON (P15389)
Attorney for Electro-Tech, Inc.
MASON, STEINHARDT & JACOBS, P.C.
/s/ WALTER B. MASON, JR. (P17187)
Attorney for City of Westland

(Certification Omitted)

APPENDIX K

MICHIGAN GENERAL COURT RULES OF 1963
GENERAL RULES OF PLEADING

Rule 111 General Rules of Pleading.

1. Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim or third-party claim, shall contain

(1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend;

(2) where the pleader seeks money, a statement that the amount in controversy exceeds $ 10,000 or is otherwise within the jurisdiction of the court; and

(3) a demand for judgment for the relief that the pleader seeks. If he seeks money, he shall demand judgment for "whatever amount [the pleader] is found to be entitled." However, the adverse party may under Rule 309 obtain a demand for a specific amount of money; if he does, the demand shall be treated as if it had originally been furnished under this subrule.

Declaratory relief, in cases of actual controversy, may be claimed. Relief in the alternative or of several different types may be demanded.

* * *